CASE NO. 87-1914

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DOROTHY ARN,

Petitioner,

vs.

PAMELA D. GREEN,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

PAUL MANCINO, JR.
Attorney for Respondent
One Public Square Building
Suite 1001
Cleveland, Ohio 44113
(216) 621-1742

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STATEMENT OF FACTS

In this case the petitioner set forth a statement of facts. However, the statement of facts with reference to the particular matter at issue should include those portions of the record which show affirmatively the absence of petitioner's counsel.

At the time the trial was commenced in the present case petitioner's counsel, John Carlin, who was involved in the trial of a death penalty case in another courtroom in the same Court of Common Pleas of Cuyahoga County. That was the case of State v. Mapes. In the officially reported opinion of the Mapes case a matter of the presence of John Carlin his performance is not set forth. See State v. Mapes, 19 Ohio St. 3d 108, 484 N.E. 2d 140 (1985), cert. denied, 106 S. Ct. 2905 (1986).

The record in this case shows that her attorney was absent during many phases of the trial. At the very commencement of the trial, John Carlin was not present and the trial commenced at that point without counsel being present. (Tr. 4).

The first matter to be heard and considered by the court was the motion to suppress. The motion to suppress commenced on May 31, 1983. (Tr. 3).

The entire motion to suppress was heard and argued and decided without the presence of counsel. Sgt. Joseph Markey testified and was only cross-examined by counsel for the other co-defendants. (Tr. 68).

In the meantime between witnesses a jury panel was brought into the courtroom and even sworn. (Tr. 69-70). Thereafter, Detective

Norman Sherwood testified, (Tr. 78-84). Argument was made by counsel. (Tr. 86-121).

The court reserved ruling on the motion until June 1, 1983. At that time, the court remarked to counsel concerning the absence of defense counsel:

> Mr. Shaughnessy, do you know whether or not Mr. Carlin is going to be available first thing in the morning?
>
> MR. SHAUGHNESSY: I haven't had a chance to call. If the Court permits, I will pick up your phone right here and call, I would assume so, sir. (Tr. 123).

Counsel did not at all appear on May 31, 1983 a critical portion of the case. Counsel did appear on June 1, 1983. (Tr. 131).

Later, the record reflects that counsel was absent and the following colloquy took place:

> THE COURT: Let's take Mr. Carlin. I note for the record that you are on your feet. Apparently you have something to say to the Court. You may proceed.
>
> MR. CARLIN: Yes, Your Honor. In view of the fact that I was not available yesterday afternoon when the Motion to Suppress was heard, I would just like for the purposes of appeal and for the record to join in the Motion to Suppress.
>
> I don't know whether it was on the record or not, as counsel for Pamela Green. (Tr. 313).

Second, counsel also absented himself during the testimony of one of the main prosecution witnesses, Maureen McNea. Cross-examination was had by counsel for the co-defendant, but there was no cross-examination by counsel for the petitioner, Pamela Green. (Tr. 296).

The court was aware of the absence of counsel and this matter was brought to the attention of the court, then the following colloquy took place:

> MR. SHAUGHNESSY: Your Honor, in this matter, its now twenty minutes to 4:00. Counsel for Otis and Wendy Rodgers, having conducted a somewhat brief cross-examination from 2:00, in any

> event, it appears that we were, of course, hoping that Mr. John F. Carlin, attorney for Pam Green, would be back in time to resume his cross-examination.
>
> That not being the case, the record should reflect that he was in a chair case, a murder case, I think we have already mentioned, the State of Ohio vs. David Mapes, before the Honorable James Patrick Kilbane.
>
> That trial concluded with a verdict of guilty on Friday. The sentencing portion, in which the jury is involved, because it is a chair case, was supposed to have taken, supposed to be a week interval everyone thought.
>
> Now, it didn't work out that way. Mr. Carlin then has been called back, and he has had to absent himself from the courtroom. I don't know what he might ask the Court to do.
>
> THE COURT: I can answer that.
>
> MR. SHAUGHNESSY: But I would ask you if you would do this. At least have the young lady available. Carlin may want to recall her. I don't know.
>
> THE COURT: Let the record reflect the Court, in anticipation of this problem with Mr. Carlin, discussed it with him prior to the lunch break, and he informed me that he would be content with Mr. Shaughnessy's cross-examination on behalf of all three defendants, so with that assurance, the Court feels that one cross-examination is sufficient. (Tr. 298-99).

When it was obvious that the petitioner did not have counsel and certainly the trial should not proceed without counsel the petitioner herself brought this to the attention of the court. (Tr. 305-06).

When counsel did return on the following day, June 3, 1983 she did express her desire to retain new counsel. (Tr. 308). Later, respondent moved for a mistrial due to the absence of counsel. (Tr. 403-04).

Later when the exhibits were being offered John Carlin again was not present. (Tr. 478-79). This was important because there was a stipulation concerning the respondent, Pamela Green, which was stipulated to by counsel for the co-defendant, Thomas Shaughnessy. (Tr. 479).

Moreover, when the motion to suppress was renewed, counsel again was not present. (Tr. 480-88, 518-19).

Again later when exhibits were being admitted John Carlin again was not present. (Tr. 510).

Later during the deliberation of the jury there was a question to be asked by the jury. Attorney Thomas Shaughnessy was present, but John Carlin was not present. (Tr. 923-27).

Certainly, it cannot be said under these circumstances that the respondent was afforded the effective assistance of counsel. The court clearly had the opportunity in this case to correct the situation by granting a mistrial as to the respondent, Pamela Green, but rejected that opportunity. Under these circumstances the respondent has been denied the effective assistance of counsel and therefore her conviction is constitutionally invalid.

ARGUMENT

I

THE SUPREME COURT SHOULD NOT ENTERTAIN THIS APPEAL DUE TO THE FACT THAT THE MATTER HAS BECOME MOOT.

This is an appeal by the petitioner from the judgment of the United States Court of Appeals for the Sixth Circuit affirming the granting of a petition for a writ of certiorari. Respondent had originally been sentenced by the Court of Common Pleas of Cuyahoga County to a term of imprisonment.

In this case, after the United States District Court for the Northern District of Ohio, Eastern Division, granted the petition for writ of certiorari, respondent moved for release on bond pending an appeal by the petitioner to the United States Court of Appeals. This motion for release of bond was denied by the United States District Court.

Thereafter a motion for release on bond was filed with the United States Court of Appeals for the Sixth Circuit. The petitioner opposed any release on bond in this case and the United States Court of Appeals for the Sixth CIrcuit denied the motion for release on bond.

Thus, during these proceedings the respondent has remained in jail.

During the pendency of the appeal, on May 23, 1986 respondent was released from imprisonment at the Woman's Correctional Facility at Marysville, Ohio. She was released to a halfway house in Columbus, Ohio until January 5, 1987. On January 5, 1987 her status was that of a parole release. She remained on parole until February 10, 1987 when she was released from supervision. Given the fact that respondent is no longer in custody and any parole supervision has been terminated this matter has now become moot.

Under applicable Ohio law even if the conviction were overturned and the respondent were retried and convicted of the original offense she would have to be released to her present condition, that is, of no supervision and outright release. In Ohio where a conviction has been turned overturned and the party has been released on parole or any other status short of imprisonment, the court, upon resentencing, is required to put the person back in the same position. Thus, in State v. Peck, 26 Ohio App. 3d 133, 498 N.E. 2d 1087 (1985), the court ruled that where one had been sentenced to a term of imprisonment and was released on parole and his conviction thereafter overturned and the person was again resentenced by the court the person had to be resentenced to parole and not to jail.

Therefore, under applicable Ohio law even if the respondent were convicted again she would have to be placed in the same status as she is now. Consequently, under these circumstances there is nothing more than a moot situation and the court cannot consider a moot case.

In these circumstances the federal courts are without power to decide questions that cannot affect the right of litigants in the case before them. North Carolina v. Rice, 404 U.S. 244, 246 (1971).

The situation presented in this case is similar to that considered in DeFunis v. Odegaard, 416 U.S. 312 (1974). In that case an action was bought by an unsuccessful applicant to a state university law school challenging the denial of admission to the law school on the ground that the admissions policy was unconstitutional. During the course of the litigation and by the time the matter reached the Supreme Court the student was presently in his last quarter of his final year of law school and that any decision on the merits would not prevent the

graduation. Under these circumstances the case was deemed moot when attempted to be reviewed by the Supreme Court.

The same applies in this case. Had the respondent been released on bond the matter would not have become moot. However, because the petitioner opposed the release of the respondent on bond after the United States District Court had granted the petition for writ of habeas corpus the matter has now become moot. Therefore there is no case or controversy present before this court for consideration. In cases involving writs of habeas corpus with respect to state cases and where the petitioner had been released on parole or outright the matter has become moot. Marchese v. State of California, 545 F. 2d 645 (9th Cir. 1976).

II

WHERE THE RECORD SHOWS MANY ABSENCES OF COUNSEL AND THE FAILURE OF A TRIAL COURT TO ALLOW COUNSEL TO ATTEND THE PROCEEDINGS A DEFENDANT HAS BEEN DENIED THE ASSISTANCE OF COUNSEL AND IS ENTITLED TO A NEW TRIAL REGARDLESS OF A DEMONSTRATION OF PREJUDICE FOR PREJUDICE IS PRESUMED UNDER THESE CIRCUMSTANCES.

In this case, both the District Court and the Court of Appeals ruled that prejudice was not required. This would appear to be a correct assessment of the issue. Even with the absences of counsel it would seem that prejudice would, at a minimum have to be presumed under these circumstances.

While the United States Supreme Court has stated that prejudice may be a proper inquiry where counsel has performed during the trial prejudice is presumed when there is an absence of counsel.

In United States v. Cronic,, 104 S. Ct. 2039 (1984) the Supreme Court stated that prejudice is presumed when there is a denial of counsel:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical state of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974) because the petitioner had been "denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing o f want of prejudice would cure it.'" Id., at 398 (Citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1,3 (1965). 104 S. Ct. at 2047.

In another case decided by the United States Supreme Court on the same date, Strickland v. Washington, 104 S. Ct. 2052 (1984) the Supreme

Court again held that if prejudice is a proper inquiry in such circumstances, prejudice may be presumed:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at _____, _____, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. Id., at _____. Moreover, such circumstances involve impairments of the Sixth Amendment right that re easy to identify and, for that, reason and because the prosecution is directly responsible, easy for the government to prevent. 104 S. Ct. at 2067.

Recently, the Supreme Court has again considered whether one who has been deprived of counsel at a critical stage of the proceedings is entitled to a reversal of the conviction. In noting that some constitutional violations, such as a denial of counsel require an automatic reversal the Supreme Court in Satterwhite v. Texas, 108 S. Ct. 1792 (1988), stated the following:

> Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceedings fall within this category. See Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L.Ed2d 426 (1978) (conflict of interest in representation through entire proceedings); Chapman, supra, 386 U.S. at 23, n. 8, 87 S.Ct., at 828, n 8 (citing Gideon v. Wainwright, 372 U.S. 335, 83, S. Ct. 792, 9 L.Ed.2d 799 (1963) (total deprivation of counsel throughout entire proceedings); White v. Maryland, 373 U.S. 59, 83 S. Ct. 1050, 10 L.Ed.2d 193 (1963) (absence of counsel from arraignment proceedings that affected entire trial because defenses not asserted were irretrievably lost); Hamilton v. Alabama, 368 U.S. 52, 82, S.Ct. 157, & L.Ed 2d 114 (1961) (same). Since the scope of a violation such as a deprivation of the right to conflict-free representation cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative. As explained in Holloway:
>
> > "In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations

of the jury. But in a case of joint representation of conflicting interests the evil-it bears repeating-is in what the advocate finds himself compelled to refrain from doing, not only at trial, but also as to possible pretrial plea negotiations and in the sentencing process.... Thus, any inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." 435 U.S., at 490-91, 98 S.Ct., at 1181-1182 (citations omitted). 108 S.Ct. at 1797.

C O N C L U S I O N

This case presents no issues that are needed to be considered by the Supreme Court. The matter has been considered in depth both by the District Court and by the Court of Appeals. However viewed, respondent was denied the assistance of counsel and was entitled to the grant of a writ of habeas corpus. Therefore the petition for writ of certiorari should be denied.

PAUL MANCINO, JR.
Attorney for Respondent
One Public Square Building
Suite 1001
Cleveland, Ohio 44113
(216) 621-1742

S E R V I C E

A copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Rita S. Eppler, Attorney for Petitioner, on this _____ day of August, 1988.

Attorney for Respondent

APPENDIX "A")ER OF U.S. COURT OF APPEALS D. ING BOND

Nos. 85-3745, 85-3796

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

APR 3 1986

JOHN P. HEHMAN, Clerk

PAMELA D. GREEN,

Petitioner-Appellant,
Cross-Appellant,

v.

DOROTHY J. ARN,

Respondent-Appellant,
Cross-Appellee,

ORDER

This matter is before the Court upon the petitioner-appellee's motion for release pending appeal or, alternatively, motion to vacate a stay of the district court's order of August 16, 1985. The order granted petitioner's petition for writ of habeas corpus because she was denied effective assistance of counsel, but petitioner remains incarcerated because the court subsequently denied bail pending appeal. The state filed a memorandum in opposition.

Upon consideration of the record, the Court concludes that the stay should not be vacated. Cagle v. Davis, 520 F. Supp. 297, 311 (E.D. Tenn. 1980), aff'd mem., 663 F.2d 1070 (6th Cir. 1981). Similarly, this Court concludes that the district court did not abuse its discretion in denying bail. Federal Rules of Appellate Procedure 23(c) provide:

> Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or

> without surety, unless the court or justice or judge rendering the decision, or the court of of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

The cases interpreting this rule have drawn a distinction between those cases in which an incarceration results from a judicial determination of guilt and those in which it is based on other reasons. Where the habeas relates to an incarceration that follows trial, conviction and sentence there needs to be "some circumstance making this application exceptional and deserving of special treatment in the interest of justice." Aronson v. May, 85 S. Ct. 3, 5 (Douglas, Circuit Justice, 1964). See also Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985); Glynn v. Donnelly, 470 F.2d 95, 97-98 (1st Cir. 1972).

Here, the evidence against petitioner at trial was strong and the respondent has indicated that petitioner will be retried if the district court's decision granting the writ is not reversed. Under these facts, the "special circumstances" making this application "exceptional and deserving of special treatment" are lacking. Cf. Jago v. United States District Court, Northern District of Ohio, 570 F.2d 618 (6th Cir. 1978) (period for new trial had expired).

IT IS ORDERED that the motion to vacate the stay is DENIED.

IT IS FURTHER ORDERED that the motion for bail is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman, II
Clerk

APPL IX "B" ORDER OF DISTRICT COURT ..NYING BOND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PAMELA D. GREEN	)	CASE NO. C84-3026
	)	
Plaintiff	)	JUDGE SAM H. BELL
	)	
-v-	)	
	)	O R D E R
DOROTHY J. ARN, SUPT.	)	
	)	
Defendant	)	

For the purpose of clarifying the record, the court hereby denies the petitioner's motion for release on bail pending appeal. The reasons for denying this motion are set forth in the court's previous orders of August 16, 1985 and September 17, 1985.

IT IS SO ORDERED.

SAM H. BELL
U. S. DISTRICT JUDGE